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# Statute of Limitations--Pleading by Non-Resident

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and eight individuals who had indorsed the note for the accommodation of the maker. Two of these co-sureties sought to set off their deposits against their liability as indorsers. The Court there held that if the maker is insolvent and all the co-sureties were solvent, these depositors could offset one-eighth of their liability with their deposit in the bank. If any one or more of the indorsers are insolvent, the right of set-off will be allowed only to the proportion that they are required to pay.[16]

The conclusion to be reached from a consideration of these cases is that this state has fallen in line with the majority of the states in adopting what we believe to be the more logical and just rule. While it is true that at first glance a denial of the right of set-off would seem to work a hardship, a consideration of the facts shows that the adoption of any view contrary to that of the Court of Appeals would have that effect. As was said by the Court in *Lippitt* v. *Thames Loan & Trust Co.*,[17] "This rule would seem to be based on sound reason. The indorser cannot lose if the maker be good, while if the set-off be allowed, the estate of the insolvent may be diminished for the sole benefit of the debtor. He will thus pay less of his debt than any other debtor, or the indorser would get a larger percentage of his deposit than other depositors. This result would be inequitable."

RUBIN BARON.

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STATUTE OF LIMITATIONS—PLEADING BY NON-RESIDENT.

By the Statute 4 and 5 Anne (1705) c. 16, if at the date of the accrual of the action, the person liable to be sued is absent, "beyond the seas," the period of limitation does not begin to run in favor of such person until his return into the realm.[1] That statute was construed "to include both residents and non-residents, subjects and foreigners alike." [2] Practically all of the states of the United States have adopted that statute in some form, and have,

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[16] Of course, where the note is made for the accommodation of one who appears thereon as indorser, and the bank discounts the same and credits the proceeds to his account with knowledge of its accommodation character, the indorser in such cases, not having any recourse to the maker, a set-off will be allowed, for any question of an inequitable preference does not then arise. Building & Engineering Co. v. Northern Bank, 206 N. Y. 400, 99 N. E. 1044 (1912).

[17] *Supra* note 1.

[1] 3 STEPHENS, COMM. ON LAWS OF ENGLAND (18th ed. 1925) p. 481.

[2] Ruggles v. Keeler, 3 Johns. 263, 267 (N. Y. 1808); Mason, Chapin & Co. v. Union Mills Paper Mfg. Co., 81 Md. 446, 32 Atl. 311 (1895).

in almost all the jurisdictions, construed it to apply to both residents and non-residents.[3]

New York State adopted such a statute, and today it provides in part: "If when the cause of action accrues against a person, he is without the state, the action may be commenced within the time limited therefor, after his return into the state.[4] The construction put upon the statute includes both residents and non-residents.[5]

The construction of the statute as applying to non-residents raised an unusual and interesting question in the very early history of the state of New York, and such question continues to come up in present-day litigation. In the year 1808 in the case of *Ruggles* v. *Keeler*,[6] the following situation was presented: An action in assumpsit was commenced in this state by a resident of Connecticut against a resident of the same state. The defendant, as a set-off, pleaded certain demands which if they had been sued on in Connecticut, the state in which they arose, would have been barred by the six-year Statute of Limitations of that state. Chief Judge Kent held that the defendant was entitled to a set-off of such demands, on the ground that if the defendant had pursued the present plaintiff in this state and sued here on those demands, the present plaintiff could not set up the New York six-year statute of limitations, for in view of the statute similar to the one above quoted,[7] the limitations against the defendant's right of action did not begin to run until the plaintiff had come within this state, and therefore as plaintiff had not been here more than six years, defendant would be entitled to maintain the action. The "decision inevitably involves the principle that a foreign plaintiff may institute an action against his debtor, coming into the State of New York, upon a cause of action, of more than six years' standing provided he has not suffered his debtor to reside there six years before commencing his

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[3] 3 WILLISTON, CONTRACTS (1924) §2007. But in a number of the states, notably New Jersey, Texas and Oregon, the rule is *contra*. See Beardsley v. Southmayd, 15 N. J. L. 171 (1835); McCormick v. Blanchard, 7 Ore. 232 (1879); Crane v. Jones, 24 Ore. 419, 33 Pac. 869 (1893); Wilson v. Dagett, 88 Tex. 375, 31 S. W. 619 (1895); Huff v. Crawford, 88 Tex. 368, 30 S. W. 546 (1895); Lynch v. Ortlieb, 87 Tex. 590, 30 S. W. 545 (1895); Van Santvoord v. Roettler, 35 Ore. 250, 57 Pac. 628 (1899); Pollard v. Allen, Ct. of Civ. Appeals Tex. No. 656, 171 S. W. 530 (1914); Fargo v. Dickover, 87 Ore. 215, 170 Pac. 289 (1918).

[4] N. Y. C. P. A. §19.

[5] Ruggles v. Keeler, *supra* note 2; Cole v. Jessup, 10 N. Y. 96 (1854); Gans v. Frank, 36 Barb. 320 (N. Y. 1862); Riker v. Curtis, 17 Misc. 134, 39 N. Y. Supp. 340 (1896); Moloney v. Tilton, 22 Misc. 134, 39 N. Y. Supp. 340 (1897); Ackerman v. Ackerman, 200 N. Y. 72, 93 N. E. 192 (1910); National Surety Co. v. Ruffin, 242 N. Y. 413, 152 N. E. 246 (1925); Laurencelle v. Laurencelle, 217 App. Div. 159, 216 N. Y. Supp. 384 (2d Dept. 1926); Backus v. Severn, 127 Misc. 776, 216 N. Y. Supp. 381, *aff'd*, 224 App. Div. 72, 229 N. Y. Supp. 376 (1st Dept. 1926).

[6] *Supra* note 2.

[7] *Supra* note 4.

suit." [8] The argument urged by the plaintiff in the *Ruggles* case, against this rule is "that stale demands might in this way be revived and enforced against persons who happen to be found in this state, and have not resided here long enough to be protected by the Statute of Limitations of this State." [9] To this the Court answers "that a presumption of payment will undoubtedly attach to stale demands." * * * And "that this presumption of payment must as a matter of evidence, be left in each case to be raised or repelled by the respective parties and in this way any serious inconvenience from the revival of dormant claims will be avoided." [10]

In 1835, in *Beardsley* v. *Southmayd*,[11] a New Jersey Supreme Court decision, the precise question on a similar set of facts was determined. The Court there held that the foreign debtor might plead the New Jersey statute of limitations and that the tolling statute did not suspend the Statute of Limitations so as to save the plaintiff's cause of action. Plaintiffs and defendants were both residents of Connecticut when the cause of action accrued and remained so for more than six years after the accrual. Subsequently, the plaintiff who was still a non-resident secured jurisdiction of the defendant in New Jersey. To the defendant's plea of the New Jersey six-year Statute of Limitations, plaintiff answered, that under the statute which enacted, that if the debtor "shall not be a resident in this state when the cause of action accrues, * * * then the period of his non-residence shall not be computed as any part of the time limited by the statute," his cause of action was saved, as the defendant being a non-resident, the Statute of Limitations was suspended until he came within the jurisdiction of the state, and that as defendant had not been in the State of New Jersey more than six years he could not plead the statute. As to this contention the Court held: "It is true the plaintiff brings his case prima facie within the saving influence of the act * * *. But no such equity exists in reference to foreign creditors, whose action did not accrue here and whose debtor did not reside here when the right of action accrued. Such a creditor or plaintiff has not been hindered or delayed by the absence of the defendant from this state. Nor was the defendant in such case bound to come into this state to perform his contracts, or to be sued in our courts for not doing so. The doctrine contended for by the plaintiff, would require us to read our Act of 1820 as if it subjected every stranger coming into this state, to be liable for the term of six years to the suits of foreign plaintiffs, wherever the cause of action arose and however antiquated the claim." [12] As can be seen, the *Beardsley* case is contra to the rule set down in the *Ruggles* case and restricts the saving statute

[8] Beardsley v. Southmayd, *supra* note 3, at 174.
[9] Ruggles v. Keeler, *supra* note 2, at 267.
[10] *Id.* 268.
[11] *Supra* note 3.
[12] Beardsley v. Southmayd, *supra* note 3, at 177

solely to residents who are such when the cause of action accrues. The theory on which the decision is based is that if a non-resident plaintiff elects to sue in the state of New Jersey, he must take that privilege burdened with the duty of prompt action and must sue upon his demand before statutes of the forum which he has chosen run against it. In disapproving the rule in the *Ruggles* case, the Court in the *Beardsley* case also disapproved of the answer given by the Court to the plaintiff's claim of "stale demands." It says, "the court as may be seen in that case, 3 Johns. R. 263, 268, instead of the shield which the salutary and quieting influence of the statute would afford a defendant under such circumstances, would leave him to the uncertain and doubtful protection of presumptive payment. It is very easy to see, that in many cases, mere presumption of payment, from lapse of time would be a feeble and precarious defense where in a suit between the parties at home the statute would be a positive bar." [13]

The courts of the State of Oregon, in construing a statute similar to that of New York State, held that the statute did not apply where the litigants were non-residents and that the foreign debtor may plead the Oregon Statute of Limitations as a bar to the action.[14] In that case plaintiff pleaded that he had recovered a judgment in South Dakota against the defendants in 1895, who were then residents of that state; that under the laws of South Dakota an action on a judgment may be brought within twenty years, that under the laws of Oregon, the period is ten years, and that as defendant has not resided in Oregon more than ten years, statute has not run against plaintiff's claim. The Court held that the saving clause of the statute did not apply to the plaintiff in that the ten-year Statute of Limitations was not suspended in favor of the plaintiff, but ran from the date of accrual of the cause of action in South Dakota and hence the action is barred. The Courts of Texas have held substantially the same.[15]

The New York Courts have steadfastly clung to the rule of *Ruggles* v. *Keeler* through a long line of decisions [16] and it has been followed by the courts of many sister states.[17] No dissent was heard in New York until 1928 when Judge O'Malley in *Garrison* v. *Newman*,[18] said: "We think it would lead to a practical

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[13] *Id.* 174.

[14] Fargo v. Dickover, *supra* note 3.

[15] See Texas cases, *supra* note 3.

[16] Olcott v. Tioga R. Co., 20 N. Y. 510 (1859); Gans v. Frank, *supra* note 5; Power v. Hathaway, 43 Barb. 214 (N. Y. 1864); Mayer v. Friedman, 7 Hun 218 (N. Y. 1876); Miller v. Brenham, 7 Hun 330 (N. Y. 1876), *aff'd*, 68 N. Y. 83 (1877); Riker v. Curtis, *supra* note 5; Plummer v. Lowenthal, 165 N. Y. Supp. 220 (App. T. 1st Dept. 1917); Laurencelle v. Laurencelle, *supra* note 5.

[17] Hatch v. Spofford, 24 Conn. 432 (1856); Paine v. Drew, 44 N. H. 306 (1862); Mason, Chapin & Co. v. Union Mills Paper Mfg. Co., *supra* note 2; Belden v. Blackman, 118 Mich. 448, 76 N. W. 979 (1898).

[18] 222 App. Div. 498, 227 N. Y. Supp. 78 (1st Dept. 1928).

absurdity to hold that where both parties to an action are non-residents at the time of the accrual of the right of action in favor of one of them, and which accrued without the jurisdiction, that the six-year statute of limitations would not start to run until the non-resident plaintiff had come into this jurisdiction. Were such a rule to be adopted, rights of action accruing outside this state, between non-residents at the time of such accrual would be kept alive interminably. The courts of this state would be flooded with actions brought on ancient and well-nigh forgotten rights. It would lead to manifest injustice in many cases because of the long lapse of time, resulting in loss of evidence and deprivation of witnesses." [19]

The gist of *Garrison* v. *Newman,* is an echo of the principles set forth in *Beardsley* v. *Southmayd,* but it is an echo that has been quickly silenced. For in *Meyer* v. *Credit Lyonnais,*[20] the Court of Appeals has reaffirmed the rule of *Ruggles* v. *Keeler.* The parties were both non-residents. The plaintiff is suing the defendant on a claim which arose in Russia in 1918 against a French bank. At the commencement of the action in 1930 neither the Russian nor the French statute of limitations had run against the claim. Here too the plaintiff claims that Section 19 of the New York Civil Practice Act, the saving statute, does not favor the plaintiff, and defendant thus sets up the six-year statute as a bar to the plaintiff's claim. Judge Hubbs, writing for the court, said: "We believe the question is no longer open in this court. Ever since the opinion rendered in the case of *Ruggles* v. *Keeler* * * * it has been the accepted law of this state that where a non-resident sues another non-resident in the courts of this state upon a claim which arose in a foreign jurisdiction, the non-resident defendant may not successfully plead our statute of limitation as a bar to the action * * *. So far as the case of *Garrison* v. *Newman* is in conflict, it is disapproved." [21]

The situation in the *Meyers* case differs from the *Ruggles* case in only one particular and that is: the claim had not been barred in the foreign jurisdiction when suit was commenced in this state. But the Court reaches the same result and the rule in 1932 remains as established in 1808.

The practical result of the rule is that as between non-residents there can never be a real barring of a debt by limitations. The debtor would not be safe in this state from the annoyance of defending stale claims which have been barred in the jurisdiction in which they arose. If the long line of decisions in support of the principle are fundamentally correct, there can never be a quieting of the affairs of a non-resident debtor on coming into this state until he has lived here the full period of the Statute of Limitations.

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[19] *Id.* 81.

[20] 259 N. Y. 399, 182 N. E. 63 (1932).

[21] *Id.* 402, 404.

Statutes of limitation have been called statutes of repose.[22] The adoption of the New Jersey rule in New York State would accomplish such repose.

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THE JOINT RESOLUTION AS A METHOD OF REDISTRICTING STATES.

The Supreme Court recently had occasion to interpret the term "Legislature" under Section 4 of Article I of the Federal Constitution which makes provision for the election of representatives, as follows:

> "The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

The issue arose when the State of New York, by concurrent resolution of the Senate and Assembly, adopted April 10, 1931, sought to accomplish the districting of the state into forty-five districts for the election of representatives to the Congress of the United States. The Secretary of State, invoking the provisions of Article I, Section 4 of the Federal Constitution, and the requirements of the New York State Constitution, refused to certify that representatives were to be elected in the congressional districts defined in the resolution, in that it required the enactment of a law which had to be approved by the Governor. Mandamus proceedings were commenced to compel the Secretary of State to carry out the provisions of the concurrent resolution. The state courts, in sustaining the respondent's contention, held that the term contemplated the exercise of the law-making power. The Supreme Court affirmed this decision.[1]

Ordinarily the term "legislature" has reference to a representative law-making body. It has the power to do certain things with-

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[22] Adams v. Coon. 36 Okla. 644, 129 Pac. 851 (1913) p. 853: "Statutes of Limitation are statutes of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time and surprising the parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time, or the defective memory or death or removal of witnesses. 25 Cyc. 985." See also Hart v. Goadby, 72 Misc. 232, 129 N. Y. Supp. 892 (1911); Hayes v. McIntire, 45 Fed. 529 (C. C. W. D. Mo. 1891).

[1] Koenig v. Flynn, 141 Misc. 840, 253 N. Y. Supp. 554 (1931), *aff'd*, 234 App. Div. 139, 254 N. Y. Supp. 339 (1st Dept. 1931), *aff'd*, 258 N. Y. 292, 179 N. E. 705 (1932), *aff'd*, 285 U. S. 355, 52 Sup. Ct. 403 (1932).